UNITED MALAYAN BANKING CORPORATION BERHAD

v.

PALM AND VEGETABLE OILS (M) SDN. BHD. & 3 ORS.

SUPREME COURT, PULAU PINANG
DATO' PEH SWEE CHIN SCJ,
TAN SRI DATO' HJ MOHD EUSOFF BIN CHIN SCJ,
DATO' MOHAMED DZAIDDIN BIN HJ ABDULLAH SCJ
[CIVIL APPEAL NO. 02-72-93]
22 JUNE 1994

PRACTICE & PROCEDURE: Application to dismiss action for want of prosecution - Application made under inherent jurisdiction of the Court - Principles applicable - Whether there was inordinate and inexcusable delay on the part of the plaintiff in prosecuting the action - Whether delay had caused prejudice to the defendants - Whether defendants contributed to the delay - Whether trial Court had exercised discretion properly.

The plaintiff sued the defendants claiming for moneys owed under banking facilities granted to the first defendant and guaranteed by the second, third and fourth defendants. The plaintiffs application for summary judgment was dismissed and on the hearing of the summons for directions on 25 July 1986, the SAR ordered the parties to serve on each other a list of documents and file an affidavit verifying such list within 60 days of the date of the order. The plaintiff's solicitors filed and served an affidavit verifying the list of documents on 6 October 1987.

The defendants did not file their verifying affidavit, despite reminders from the plaintiff's solicitors, and in the circumstances the said solicitors filed the request for setting down action for trial on 3 July 1988. On 3 April 1989 the defendants filed their summons in chambers to dismiss the plaintiff's action for want of prosecution.

The defendants contended that there was a lapse of more than 3 years from the date of the judgment of the Federal Court, dismissing the plaintiff's appeal on the summary judgment, until the plaintiff took out the summons for directions and that the plaintiff had not properly set down the action for trial for about 2 $^{1}/_{2}$ years after the expiry of the period allowed by the Court under the order on the summons for directions. The defendants stated that the fact that nine years had passed since the filing of the writ during which period important key witnesses had died and the control of the plaintiff bank had changed hands a few times had substantially prejudiced them if the action were to go to trial.

The plaintiff stated that there was a reasonable and credible excuse for the delay and contended that it was caused by the several negotiations held, with a view to an amicable settlement, where both parties had actively participated. On the question of prejudice, the plaintiff submitted that its claim was based on well-documented commercial lending transactions in which oral evidence would not play a prominent part. The plaintiff further stated that the defendants had not provided any particulars or further evidence to substantiate their averment that their key witnesses had died. The plaintiff further argued that even if the delay was inordinate and inexcusable, the defendants themselves have contributed to the said delay and were themselves guilty by not filing their list of documents within the stipulated time.

The defendants application was allowed in the High Court and the plaintiff appealed further.

Held:

[1] The Court has an inherent jurisdiction to dismiss an action for want of prosecution if there had been default in complying with the rules or excessive delay in the prosecution of the action. Generally speaking, the same principles are applied whether the Court is acting under its express power, in O. 25 r. 1(5) or O. 34 r. 8(1) of the Rules of the High Court 1980, or under its inherent jurisdiction.

[2] In an application to dismiss an action for want of prosecution where there has been inordinate and inexcusable delay in the prosecution of the action, the Court should only exercise its power upon being satisfied that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers **and** that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either between themselves and the plaintiff or between each other or between them and a third party.

[3] Bearing in mind that the prejudice alleged must be shown to be "serious", the Court was satisfied that, on the facts and circumstances of this case, no serious prejudice to the respondents has been made out. The delay in the present case was due to the earnest desire of both parties to reach an amicable settlement which did not succeed.

[Appeal allowed with costs. Order of the High Court set aside. Suit ordered to be set down for early trial].

[Ed. Note: At the outset the parties agreed that the decision herein would be binding on Rayuan Sivil No. 02-81-93 and Rayuan Sivil No. 02-90-93 and the Court accordingly ordered that both these cases be similarly set down for trial**].**

[**Bahasa Malaysia** Translation of Headnote]

AMALAN & PROSEDUR: Permohonan untuk menolak tindakan kerana kekurangan dakwaan - Permohonan dibuat di bawah bidang kuasa sedia ada Mahkamah - Prinsip-prinsip yang terpakai - Samada terdapat kelewatan yang tidak patut dan tidak boleh dimaafkan di pihak plaintif dalam mendakwa tindakan tersebut - Samada kelewatan tersebut telah menyebabkan prejudis kepada defendan - Samada defendan menyumbangkan kepada kelewatan tersebut - Samada Mahkamah perbicaraan telah menggunakan budibicaranya dengan betul.

Plaintif telah menyaman defendan menuntut wang yang terhutang di bawah kemudahan-kemudahan bank yang diberikan kepada defendan pertama dan dijamin oleh defendan kedua, ketiga dan keempat. Permohonan plaintif untuk penghakiman terus telah ditolak dan di pendengaran saman minta arahan pada 25 Julai 1986, Penolong Kanan Pendaftar (PKP) telah memerintahkan pihak-pihak tersebut supaya melaksanakan penyampaian senarai dokumen kepada pihak masing-masing dan memfailkan suatu afidavit menentusahkan senarai sedemikian dalam masa 60 hari dari tarikh perintah tersebut. Penguamcara plaintif telah memfailkan dan menyampaikan suatu afidavit menentusahkan senarai dokumen pada 6 Oktober 1987.

Defendan-defendan tidak memfailkan afidavit menentusahkan mereka walaupun peringatan dibuat oleh Peguamcara plaintif, dan dalam keadaan ini Peguamcara tersebut memfailkan permintaan bagi menetapkan tindakan untuk perbicaraan pada 3 Julai 1988. Pada 3 April 1989 defendan-defendan memfailkan saman dalam kamar mereka untuk menolak tindakan plaintif kerana kekurangan dakwaan.

Defendan-defendan menghujahkan bahawa terdapat keluputan lebih dari 3 tahun dari tarikh penghakiman Mahkamah Persekutuan menolak rayuan plaintif atas penghakiman terus, sehingga plaintif mengambil keluar saman minta arahan tersebut dan bahawa plaintif tidak menetapkan tindakan tersebut untuk perbicaraan dengan sewajarnya bagi kira-kira $2^1/_2$ tahun selepas tamatnya tempoh yang dibenarkan oleh Mahkamah di bawah perintah atas saman minta arahan. Defendan-defendan menyatakan bahawa fakta yang sembilan tahun telah berlalu sejak dari pemfailan writ di mana dalam tempoh tersebut saksi-saksi penting telah meninggal dunia dan kawalan bank telah bertukar tangan beberapa kali menyebabkan prejudis yang kuat ke atas mereka jika tindakan tersebut hendak dibicarakan.

Plaintif menyatakan bahawa terdapat alasan yang munasabah dan boleh dipercayai bagi kelewatan tersebut dan menghujahkan bahawa ia adalah disebabkan oleh beberapa rundingan yang diadakan untuk mencapai penyelesaian yang baik, di mana kedua-dua pihak telah mengambil bahagian dengan aktifnya. Mengenai persoalan prejudis, plaintif menghujahkan bahawa tuntutannya adalah berdasarkan kepada transaksi pinjaman komersial yang bertulis di mana keterangan lisan tidak akan memainkan peranan yang penting. Selanjutnya plaintif menyatakan bahawa defendan-defendan tidak memberikan apa-apa butir mengenai keterangan lanjutan untuk menyokong penegasan mereka bahawa saksi-saksi penting telah meninggal dunia. Seterusnya plaintif menghujahkan bahawa jika sekalipun kelewatan tersebut adalah tidak patut dan tidak boleh dimaafkan, para defendan sendiri telah menyumbangkan kepada kelewatan tersebut dan mereka sendiri adalah bersalah kerana tidak memfailkan senarai dokumen mereka dalam tempoh yang ditetapkan.

Permohonan para defendan telah dibenarkan dalam Mahkamah Tinggi dan plaintif seterusnya membuat rayuan.

Diputuskan:

[1] Mahkamah mempunyai bidang kuasa sedia ada untuk menyingkirkan sesuatu tindakan

kerana kekurangan dakwaan jika terdapat keingkaran dalam mematuhi kaedah-kaedah atau lewat sebegitu sekali dalam dakwaan tindakan berkenaan. Secara umumnya, prinsip-prinsip yang sama adalah terpakai sama ada Mahkamah bertindak di bawah kuasa nyatanya, dalam Aturan 25 kaedah 1(5) atau A. 34 k. 8(1), Kaedah-kaedah Mahkamah Tinggi 1980, atau di bawah bidang kuasa sedia adanya.

[2] Dalam sesuatu permohonan untuk menolak tindakan kerana kekurangan dakwaan di mana terdapatnya kelewatan yang tidak patut dan tidak boleh dimaafkan dalam dakwaan tindakan tersebut, Mahkamah hanya perlu menggunakan kuasanya apabila ia berpuashati bahawa terdapat kelewatan yang tidak patut dan tidak boleh dimaafkan di pihak plaintif atau Peguamnya dan bahawa kelewatan sedemikian akan membawa kepada risiko yang tinggi di mana tidak mungkin terdapat perbicaraan yang adil mengenai isu-isu dalam tindakan atau berupaya menyebabkan atau telah menyebabkan prejudis yang serius kepada para defendan sama ada di antara mereka dan plaintif atau di antara sesama mereka sendiri atau di antara mereka dengan pihak ketiga.

[3] Dengan mengambil ingatan bahawa prejudis yang dikatakan itu mestilah ditunjukkan sebagai "serius" Mahkamah berpuashati bahawa, atas fakta-fakta dan keadaan kes ini, tiada prejudis yang serius dibuat kepada responden-responden. Kelewatan dalam kes ini adalah disebabkan oleh hasrat murni kedua-dua pihak untuk menyelesaikan perkara ini secara baik, tetapi tidak berjaya.

[Rayuan dibenarkan dengan kos. Perintah Mahkamah Tinggi diketepikan. Guaman diarahkan supaya ditetapkan untuk perbicaraan yang awal].

[**Nota Ed:** Pada mula-mulanya pihak-pihak tersebut telah bersetuju bahawa keputusan dalam tindakan ini akan mengikat Rayuan Sivil No. 02-81-93 dan Rayuan Sivil No. 02-90-93 dan Mahkamah dengan itu memerintahkan supaya kedua-dua kes ini ditetapkan untuk perbicaraan].

Cases referred to:
Birkett v. James [1978] AC 297 ***(refd)***
Allen v. Sir Alfred McAlpine & Sons Ltd. [1968] 2 QB 229 ***(refd)***
Vasudevan v. Damodaran & Anor. [1981] 2 MLJ 150 ***(refd)***
Sel-Rex Corporation v. P.M.D. Chemicals Ltd. [1971] RPC 297 ***(refd)***
Austin Securities Ltd. v. Northgate and English Stores Ltd. [1969] 2 All ER 753 ***(refd)***
National Insurance Guarantee Corp Ltd. v. Robert Bradford & Co. Ltd. [1970] 114 SJ 436 ***(refd)***
Ratnam v. Cumarasamy & Anor. [1965] 1 MLJ 228 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 25 r. 1(5), O. 34 r. 8(1)

Other sources referred to:
Supreme Court Practice 1993, Vol. 1, para 25/1/4, pp. 470, 472

For the appellant - D.P. Naban (Aznam Mansor with him); M/s. Lee Hisham muddin
For the respondents - K.S. Narayanan; M/s. K.S. Narayanan Associates

JUDGMENT

Mohamed Dzaiddin Bin Hj Abdullah SCJ: This is an appeal by the appellant, United Malayan Banking Corporation Berhad, from the judgment of the Kuala Lumpur High Court given on 5 August 1992, upholding the decision of the Senior Assistant Registrar in allowing the dismissal of the appellant's action for want of prosecution.

The following account of the facts of the case is taken largely from the learned Judge's grounds of judgment (p. 13 A.R.). On 12 November 1979, the appellant, who was the plaintiff in the Court below, filed a specially indorsed writ and a statement of claim against the first respondent and three others, claiming for monies owed under banking facilities granted to the first respondent and guaranteed by the second, third and fourth respondents. On 22 November 1979, the respondents entered appearance and filed their defence and counterclaim. On 12 January 1980, the plaintiff filed the reply and defence to counterclaim. On 31 March 1980, the respondents filed an amended defence and counterclaim. Later, the respondents filed a reamended defence and counterclaim, followed by the filing of an amended reply and defence to the said counterclaim.

Subsequently, on 16 June 1981, the plaintiff filed an application for an O. 14 judgment. On 9 January 1982, the Judge refused to grant leave to enter summary judgment and on appeal to the then Federal Court, the said appeal was dismissed with a direction that an early date be granted for the trial of the action.

On 4 April 1986, the plaintiff's solicitors took out a summons for direction and on 25 July 1986, the Senior Assistant Registrar ordered the parties to serve on each other a list of documents and file an affidavit verifying such list within 60 days; that there be inspection of documents within 14 days of service of the list and the filing of the affidavits; and that the estimated length of time for the trial be four days and that there be 14 witnesses and that the trial be set down for hearing within 120 days. The plaintiff's solicitors accordingly filed an affidavit verifying the list of documents on 6 October 1987 and served it on the respondents on the same date. Then, on 8 December 1987, the said solicitors sent a reminder to the respondents' solicitors giving them notice to file their affidavit within two weeks.

As there was no response at all, on 3 July 1988, the plaintiff's solicitors filed the request for setting down action for trial. Nothing happened until after more or less waking up from their slumber, the respondents suddenly realised that it was time to apply for a dismissal of the plaintiff's claim for want of prosecution. On 3 April 1989, the respondents filed their summons in chambers which was heard by the Senior Assistant Registrar who, on 20 April 1989, granted the application and accordingly struck out the suit.

On appeal to the Judge in chambers, the respondents contended that there was a lapse of more than 3 years from the date of the judgment of the Federal Court until the plaintiff took out summons for directions. The respondents also contended that the plaintiff had not properly set down the action for trial for about 2 $^{1}/_{2}$ years after the expiry of the period allowed by the Court under the order on the summons for directions. All in all, nine years had passed since the filing of the writ and during this period, important key witnesses had died and the control of the plaintiff bank had changed hands a few times. According to the respondents, this had substantially prejudiced them if the action were to go to trial. Finally, the respondents contended that the plaintiff's solicitors had not complied with the order of summons for directions when they filed the affidavit verifying the list of documents.

The plaintiff, in its affidavit, averred that between late 1982 and April 1986, negotiations had taken place between the parties. After a lapse of about three months, a second series of negotiations took place. According to the plaintiff, their negotiations went on until 13 June 1988. When negotiations failed, the plaintiff took steps to proceed with the action by filing the affidavit verifying the list of documents on 6 October 1987.

The plaintiff contended that there had been no inordinate and inexcusable delay on its part in prosecuting the action nor had the respondents been prejudiced at all.

After hearing the submissions of Counsel, the learned Judge came to a finding that there had been inordinate and inexcusable delay on the part of the plaintiff in prosecuting the action since the Federal Court delivered its judgment on 13 October 1982. His Lordship gave the following reasons (p. 18 AR):

> It was not in dispute that there were negotiations between the parties since then. The negotiations were without prejudice negotiations. The plaintiff could not use the negotiations to justify it to violate the order on summons for directions. The order on sumnons for directions dated 25 July 1986 required the plaintiff to file an affidavit verifying the list of documents within 60 days from the date of Court order. The plaintiff filed the affidavit verifying the list of documents on 6 October 1987, that is more than a year from the date of the order without asking the Court for extension of time.
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> The plaintiff, in its affidavit (enclosure 35) alleged that "it was implicitly agreed (with the knowledge & encouragement of the defendants) that no steps be taken in the proceedings ... If there were such an agreement between the parties, whether implicit or explicit, the plaintiff should have no difficulty in getting a consent order from the Senior Assistant Registrar for extension of time to file the affidavit verifying the list of documents. But the plaintiff contravened the said order and proceeded on to set the matter down for trial.
>
> Mr. Narayanan, Counsel of the defendants submitted that there was no understanding between the parties not to proceed with the action as alleged by the plaintiff. He added that even though there were negotiations, time did not stop. I agreed with Mr. Narayanan's submission that the defendants did not acquiesce in the delay. Indeed the defendants' solicitors in a letter dated 23 December 1987 which was addressed to the plaintiff's solicitors, had protested over the delay and the conduct of the plaintiff in filing the affidavit verifying the list of documents in contravention of the order on summons for directions.

> With regard to the question of prejudice, Mr. Narayanan submitted that the defendants were prejudiced. He said that the defendants had a counterclaim. I had earlier referred to the defendants' affidavit where it was averred that the important witnesses had died and that the control of the plaintiff bank had changed hands a few times. Mr. L.H. Ng said that it was the plaintiff that was prejudiced. In my view the defendants were likely to be seriously prejudiced by the delay.
>
> I was satisfied that in the circumstances of the present case the defendants' application for an order that the plaintiff's claim be dismissed for want of prosecution was justified. The defendants' case was consistent with the principles laid down by Salmon LJ in *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 QB 229 @ 268 (D-G).

Before us, Encik Naban raised the same points which were submitted in the Court below. Counsel submitted that based on affidavit evidence, the appellant had shown that there was reasonable and credible excuse for the delay. Between 25 July 1986 and 13 June 1988, there were several negotiations which continued even after the action was set down for trial. These negotiations were held with a view to an amicable settlement where both parties had actively participated.

Again, from the correspondence, the appellant had been encouraged by the respondents to believe that a settlement would be negotiated successfully. On the question of prejudice, Counsel submitted that the appellant's claim was based on well-documented commercial lending transactions in which oral evidence would not play a prominent part. While conceding that the appellant's management had changed hands since the commencement of the action, Counsel was confident that the documents relating to the loan remained intact and would be made available during the trial. Furthermore, there were no particulars or further evidence to substantiate the respondents' averment that their key witnesses had died.

It was further argued, although by way of alternative argument, that even if the delay was inordinate and inexcusable, the respondents themselves have contributed to the said delay and were themselves guilty by not filing their list of documents within the stipulated time despite reminders from the appellant's solicitors. In this regard, Encik Naban informed us that to date, despite reminders from the appellant's solicitors, the respondents have not filed their list of documents, nor have they protested with regard to the delay in setting down the action for trial.

Encik Narayanan, for the respondents, urged us not to disturb the decision of the learned Judge because his Lordship had exercised his discretion correctly, which the appellate Court should be loath to interfere. Counsel submitted that the learned Judge had dealt with the issues raised and had come to a conclusion that there was inordinate and inexcusable delay on the part of the appellant in prosecuting the action which would prejudice the respondents.

From the record, it is clear to us that the application to dismiss the appellant's action for want of prosecution was not made under the specific provisions of O. 25 r. 1(5) (default in discovery) or O. 34 r. 8(1) (default in setting down action for trial) of the Rules of High Court 1980 but was applied under the Court's inherent jurisdiction. According to the **Supreme Court Practice 1993,** Vol. 1, para 25/1/4, p. 470, in addition to the express provisions given in the Rules of the Supreme Court, the Court has inherent jurisdiction to dismiss an action for want of prosecution if there had been default in complying with the rules or excessive delay in the prosecution of the action. Generally speaking, the same principles are applied whether the Court is acting under its express power or under its inherent jurisdiction. According to Lord Diplock in *Birkett v. James* [1978] AC 297 at p. 318,

> the High Court Judges began to have recourse to the inherent jurisdiction of the Court to dismiss an action for want of prosecution even where no previous peremptory order had been made, if the delay on the part of the plaintiff or his legal advisers was so prolonged that to bring the action on for hearing would involve a substantial risk that a fair trial of the issues would not be possible. This exercise of the inherent jurisdiction of the Court first came before the Court of Appeal in *Reggentin v. Beecholme Bakeries Ltd.* (Note) [1968] 2 QB 276 (reported in a note to *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 QB 229) and *Fitzpatrick v. Batger & Co. Ltd.* [1967] 1 WLR 706.

From the authorities, it is settled law that there are two distinct, though related, circumstances in which an action may be dismissed for want of

prosecution, namely, (a) when a party has been guilty of intentional and contumelious default, and (b) where there has been inordinate and inexcusable delay in the prosecution of the action (*Allen v. Sir Alfred McAlpine & Sons Ltd., supra,* approved in *Birkett v. James, supra,* and followed in *Vasudevan v. Damodaran & Anor.* [1981] 2 MLJ 150). On the question of inordinate and inexcusable delay, the power should be exercised only where, according to Lord Diplock, the Court is satisfied:

(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and
(b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

On the question of prejudice which must be "serious", we would rely on the passage in the **Supreme Court Practice 1993,** *supra*, (p. 472):

> This is a matter of fact and degree and has been discussed in *Allen v. McAlpine* [1968] 2 QB 229; [1968] 1 All ER 543, CA and in a large number of reported cases. The effect of the lapse of time on the memory of witnesses or, in the course of such time of their death or disappearance are the most usual factors. Their importance depends upon the circumstances, the issues and the other evidence that can be given. Thus the lapse of time may be very prejudicial if the circumstances of an accident or oral contracts or representations are in issue, but is of much less importance in a heavy, well-documented commercial action (*National Insurance Guarantee Corp. Ltd. v. Robert Bradford & Co. Ltd.* [1970] 114 SJ 436, CA). But prejudice is not limited to matters affecting proof; a defendant, particularly a professional man, may be made prejudiced by having an action hanging over his head indefinitely (*Biss v. Lambeth, Southwark and Lewisham Health Authority (Teaching)* [1978] 1 WLR 382; [1978] 2 All ER 125, CA)

Considering the grounds of judgment, it would appear to us that his Lordship has misapplied the above principles, particularly on the question of "serious" prejudice, to the given facts of the case. His Lordship relied on para 5(1) of the third respondent's affidavit alleging that nine years had passed by since the filing of the writ and, aside from important and key witnesses having died, the control of the plaintiff bank itself has changed hands a few times. It appears to us that since this affidavit was filed, there has been no further evidence to show who are the key witnesses of the respondents who have since died. As pointed out by Encik Naban, both Dato' K.K. Sharma, who incidentally is the third respondent and the alter ego of the respondent company, and Dato' Mohd Salleh Yusoff are still around. Next, his Lordship seemed to have rejected the contention that the delay was caused by the negotiations between the parties. Although, admittedly, they were on "without prejudice" basis, nevertheless it was a factor to be considered in favour of the appellant. Moreover, the negotiations were, to some extent, being encouraged by the respondents which, in the words of Encik Naban, the appellant was "in the belief that an out-of-Court settlement would be reached" (*Sel-Rex Corporation v. PMD Chemicals Ltd* [1971] RPC 297 at p. 300). Thirdly, the learned Judge overlooked the fact that the respondents themselves have yet to file their list of documents within the stipulated period under the order of the Senior Assistant Registrar in the summons for direction. This is certainly a factor to be taken into account as to whether the respondents have contributed to the delay. (*Austin Securities Ltd v. Northgate and English Stores Ltd* [1969] 2 All ER 753 CA). Fourthly, looking at the pleadings, we tend to agree with Counsel that the entire case of the appellant would depend on the documents, such as, loan agreements, letters of guarantee, title deeds and sale and purchase agreements. According to Counsel, they are still in existence (*National Insurance Guarantee Corp. Ltd. v. Robert Bradford & Co. Ltd., supra*). Having regard to the above observations and bearing in mind that the prejudice alleged must be shown to be "serious", we are satisfied that, on the facts and circumstances of this case, no serious prejudice to the respondents has been made out. On a whole, we are of the view that the delay in the present case was due to the earnest desire of both parties to reach an amicable settlement which did not succeed.

The Privy Council, in *Ratnam v. Cumarasamy & Anor.* [1965] 1 MLJ 228, held that an appellate Court will not interfere with the discretion exercised by a lower Court unless it is clearly satisfied that the discretion has been exercised on a wrong principle. However, arising from what we have stated above, we feel justified in

interfering with the learned Judge's decision. In the result, we allow this appeal with costs here and below. The order of the High Court is set aside and the suit shall now be set down for an early trial. As the parties have, at the outset of the present appeal, agreed that the decision here would bind Rayuan Sivil No. 02-81-93 and Rayuan Sivil No. 02-90-93, we accordingly order that both the cases be similarly set down for trial. Refund of the deposit to the appellant.

YIP SHOU SHAN

v.

MAJLIS PEGUAM

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK AMAR HAJI MOHD JEMURI BIN SERJAN CJ (BORNEO),
TAN SRI DATUK EDGAR JOSEPH JR. SCJ,
TAN SRI DATO' HJ MOHD EUSOFF BIN CHIN SCJ
[CIVIL APPEAL NO. 02-161-94]
23 MAY 1994

LEGAL PROFESSION: Appellant refused a Sijil Annual for the year 1994 - Accountant's Report of appellants previous firm showing discrepancies - Whether Bar Council can insist on a clean Accountant's Report - Consideration of s. 32 of the Legal Profession Act 1976 - Duties of the Bar Council under the said section - Whether appellant exempted from delivery of an Accountant's Report - Whether appellant's case falls within paragraph (2) of rule 6 of the Accountant's Report Rules 1978.

On 1 October 1990 the plaintiff left the partnership of the firm of M/s. Yip Yeo and Nasrim (plaintiff's previous firm) and commenced his own practice under the name and style of Messrs. Peter Yip and Yong. For the year 1990 the accounts of the plaintiff's previous firm had not been resolved and no Accountant's Certificate could be issued because of unfavourable comments made therein by the Accountants. The plaintiff had been issued with a Sijil Annual in respect of the years 1992 and 1993 but they were issued on certain conditions and pending the completion of the audit of the plaintiff's previous firm. When the plaintiff applied for issuance of the Sijil Annual for 1994, it was refused.

The plaintiff contended that the Bar Council cannot refuse to issue the Sijil Annual as this would amount to suspending the advocate and solicitor concerned from practice which was the prerogative of the Chief Justice. The other question that arose was whether the plaintiff was entitled to an exemption from delivery of an Accountant's Report under rule 6 of the Accountant's Report 1978.

Held:

[1] Section 32 of the Act imposes a duty on the Bar Council to process and scrutinise every application for a Sijil Annual. It is the Bar Council's paramount duty to ensure that only an honest, trustworthy, fit and proper advocate